

1893

# The Doctrine of Stare Decisis

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T H E S I S

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T H E D O U T R I N E O F  
STARE DECISIS

BY

Thomas Burns

For

The Degree of Bachelor of Laws.

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Cornell University,

School of Law.

1893.



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## CHAPTER I.

A STATEMENT OF THE DOCTRINE OF STARE DECISIS,  
ITS EXTENT, REASONS and IMPORTANCE.

## (1) STATEMENT OF THE DOCTRINE.

The rule of Stare Decisis is of ancient origin. Precisely when it became a distinctly established doctrine of English law is not easy to determine. In Croke's Reports in the seventeenth year of the reign of James I, 1584, (Cro.Jac.,527) the reporter summarizes the ratio decidendi thus: "Wherefore, upon the first argument it was adjudged for the defendant, for they said that those things which have been so often adjudicated ought to rest in peace." This seems to be a very accurate and condensed expression of the doctrine.

The name Stare Decisis is taken from the Latin maxim, stare decisis et non quieta movere, and the translation of the maxim is a good definition of the rule itself: To stand by precedent and not to disturb what is settled. It may be called the doctrine of precedent or of authority. Its meaning is that when a point of law has been once solemnly and necessarily settled by the decision of a competent court it will no longer be con-

sidered open to examination or to a new ruling by the same tribunal or those which are bound to follow its adjudications.

The general rule as laid down by the authorities is as follows: "Precedents and rules must be followed unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration;" but "if it be found a former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law." (1 Blackstone's Commentaries, pp.69-70.)

It might be considered as a kind of legal axiom that courts should not exercise their jurisdiction in any random manner for this would speedily land everything in "confusion worse confused." Of necessity there must be certain fixed land-marks approaching correctness, though not infallibly perfect; and courts should be guided by these even though a rigorous adherence to them might at times work individual hardship. These land-marks are, of course, prior decisions serving as precedents not lightly to be changed.

## (2) EXTENT OF THE DOCTRINE.

The doctrine of Stare Decisis is generally characterized by law-writers as a product or principle of the Common law. Blackstone and Kent claim it as such and the United States Supreme Court (1 Bl.Com.,70; 1 Kent's Com.,475-479; Carroll v. Carroll, 16 How.,287) refers to it expressly as "a rule which belongs to the common law" and there is an implication in the opinion that it is limited to "courts organized under the common law."

That it is a doctrine or rule of the common law there is no doubt, but that it belongs to the common law in any exclusive sense of origin, application or usage is incorrect. In the first place, it is a rule equally applicable and equally applied in equity as in the common law. Thus Blackstone says, in repelling the idea that equity consists of the "opinion of the judge": "The system of our court of equity is an elaborate, connected system governed by established rules and bound down by precedents from which they do not depart although the reason of some of them may perhaps be liable to objection." "May," he adds, "sometimes a precedent is so strictly followed in equity that a particular judgment founded upon special circumstances gives rise to a gen-



eral rule." (3 Bl. Com.,432.)

In the next place, this doctrine may be said to have had its place in the Roman law. Thus in the new Codex Constitutionum of Justinian, A.D.,534, the Codex repetitae praelectionis, lib.1, tit.XIV,12, De Legibus et constitutionibus principum et edictis, it is decreed, (translated): "Whenever the Emperor has judicially considered a case and announced a decision to the parties that have appeared in the controversy, let all judges, without exception, within our jurisdiction, know that this is the law not only for the individual case in which it was rendered but also in all like cases."

(See also Austin's Lectures on Jurisprudence,I,Sec.§58.)

### (3) REASON OF THE DOCTRINE:

The reasons which underlie this rule are stated by Chancellor Kent in a much quoted passage from his Commentaries, as follows: "A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument

and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture with confidence to buy and trust and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great land-marks of property. When a rule has been once deliberately adopted and declared it ought not to be disturbed unless by a court of appeal or review and never by the same court except for very cogent reasons and upon a clear manifestation of error; and if the practice were otherwise it would be leaving us in a state of perplexing uncertainty as to the law." (1 Kent's Com., 475; to the same effect, Jones on Bailments, 60; Butler v. Duncomb, 1 P. Wms., 452; Anderson v. Jackson, 16 Johns., 402; Bates v. Relyea, 23 Wend., 340; Cooley's Const. Lim., 50.)

#### (4) IMPORTANCE OF THE DOCTRINE:

The importance of a strict and rational ad-

herence to the doctrines of adjudged cases is remarkably exemplified in the growth of English Constitutional jurisprudence. To quote from a distinguished writer on public questions: "The principle of precedent is eminently philosophical. The English Constitution would not have developed itself without it. What is called the English Constitution consists of the fundamentals of the British polity laid down in customs, precedents, decisions and statutes; and the common law in it is a far greater portion than the statute law." (Lieber's Civil Liberty.)

And in our own country the maintenance of this doctrine is of peculiar importance on account of the deference which we are accustomed to pay to the decisions of the law courts even in cases where their logical correctness is open to doubt. This recognition of the power and provisions of the judicial tribunals in the guidance and settlement of our civil institutions leads the American citizen to yield his implicate obedience to their doctrines, even when the decision of a court lays a controlling and shaping hand, not formally perhaps, but, in the necessary deductions from its conclusions, upon the most zealously debated political questions or the most important affairs of government. Then if progress is desirable, if the growth of the

nation in the perfect development of constitutional government as well as in the stability of its institutions be a desideratum, these objects can certainly not be ~~obtained~~ by a disregard of the principle of Stare Decisis. Our past history declares this truth with unmistakable voice. To appreciate its value we have only to reflect how seriously the progress of American federalism would have been retarded if the interpretation put upon the Constitution by the Supreme Court in the formative period of our national character had been thought open to contradiction by any and every court. An objection is sometimes made to the "adherence of courts to musty, moldy authorities and antique forms and customs, whereby they seem to be wedded to error and absurdities, sanctioned and venerated merely because they have the flavor of age about them, while everything else is revolving in the whirl of progress." Undoubtedly there is some point in the ~~sensure~~ both as to statutes and adjudications, but the objection may easily be carried too far. There ought to be established standards of judgment and it is too much to require that these shall be absolutely infallible. Conservatism is equally as needful in the movement of society, of politics, of science

of law and of everything in which mankind has a general interest, as progress is. And it is needful also to demand due credentials from every innovation and to receive propositions of change with slow deliberation, although without prejudice. Conservatism and progress should be, though opposites, yet co-operative, and constantly in action. And it is highly proper that time should largely enter into the authority, the sacredness and the veneration attaching to customs and rules established by the legal wisdom and learning of former sages of the law. For the longer a rule has continued the more thoroughly has it become interwoven with the business and property interests of the community at large, and therefore the more disastrous must be the change, especially a sudden change. When once a principle has been fully recognized it should not be changed unless it is found to be unbearably wrong or unless it is changed or abrogated by the legislature, to whom the correction of errors ought usually to be left. "There are rules concerning which it is more important that they should be in some way settled than that they should be settled in any particular manner."

## CHAPTER II.

**PROPER LIMITATIONS OF THE DOCTRINE.** The principle of Stare Decisis is subject to certain necessary and proper limitations, which on the one hand secure and enhance its practical utility and on the other prevent its abuse. The more important of these limitations will be discussed.

(1) OVER-RULED CASES.

If a decision has been expressly over-ruled either by the same court which rendered it or by a court exercising appellate jurisdiction, it can, of course, no longer be cited as a precedent. The latest utterance of the court on any given point of law constitutes the authority which is not to be departed from without cause. And the same is true of decisions over-ruled by necessary implication in a subsequent case. But here it would be necessary to show beyond reasonable cavil that the two authorities were really and necessarily inconsistent rulings on a state of facts substantially identical. An exception, however, would probably be made in the case of a single decision probably erroneous, which would over-rule a series of previous authorities or unsettle the established principles of commercial law. (Aud v. Magruder, 10 Cal.282.) If a rule of law has been chang-

ed by legislative enactment the authorities are unanimous that it is stripped of all binding force.

(2) TWO EXTREMES TO BE AVOIDED.

"That doctrine" says Lowrie, J., speaking of the rule under consideration, "though incapable of being expressed by any sharp and rigid definition and therefore incapable of becoming an institute of ~~such~~ positive law is among the most important of good government. But like all such principles in its ideal it presents its medial and its extreme aspects and is approximately defined by the negation of its extremes. The conservatism that would make the institutions of to-day the rule of to-morrow and thus cast society in the rigid molds of positive law in order to get rid of the embarrassing but wholesome diversities of thought and practice that enure to free, rational and imperfect beings; and the radicalism that, in ignorance of the laws of human progress and disregard of the rights of others, would lightly esteem all official precedents and general customs that are not measured by its own idiosyncrasies; each of these extremes always tends to be converted into the other and both stand rebuked in every volume of our jurisprudence. And the medial aspect of the doctrine stands every where revealed as the only proper one. Not as an ~~arbi-~~ arbi-

trary rule of positive law, attributing to the mere memory of cases higher honor and greater value than belongs to the natural instincts and common feeling of right; not as withholding allowance for official fallibility and for the changing views, pursuits and customs that are caused by and that indicate an advanced civilization; not as underrating and thus deadening the forms that give expressions to the living spirit; not as enforcing 'the traditions of the elders' when they 'make void the law' in its true sense; nor as fixing all opinions that have ever been pronounced by official functionaries; but as yielding to them the respect which their official character demands and which all good education enjoys."

(Callender v. Keystone Mut. Life Ins. Co., 23 Pa. St., 474.)

### (3) DECISION MANIFESTLY ERRONEOUS.

Hence, in the third place, if the decision is clearly incorrect, whether from a mistaken conception of the law or through the misapplication of the law to the facts and no injurious results would be likely to flow from a reversal of it and especially if it is injurious and unjust in its operation, it is not only an allowable departure from precedent but the imperative duty of the court to reverse it. (Linn v. Minor, 4 Nev., 462; Paul v. Davis, 100 Ind., 422; Snyder v. Gascoigne, 11 Tex., 449;



McDowell v. Oyer, 21 Pa.St., 423.)

But from this rule is to be ~~excepted~~ the case of a settled and established rule of property founded upon a series of erroneous decisions. It is only upon serious considerations that the court will overthrow such a rule no matter how incorrect the previous authorities. This point will be discussed in another connection.

#### (4) ISOLATED CASES.

A single decision upon any given point of law is not regarded as conclusive as a precedent in the same degree that a series of decisions upon that point would be. (Duff v. Fisher, 15 Cal., 375; Wells on Res Adjudicata &c., Secs. 589, 599.)

The Supreme Court of California declares that the doctrine of Stare Decisis will lead it to conform to a principle of merchantile law established all over the world rather than to follow a decision of its own made a few years before, which is a very decided and injurious innovation upon that principle. (Aud v. Magrunder, 10 Cal., 282.)

#### (5) OBLITER DICTA.

The maxim of Stare Decisis contemplates only such points as are actually involved and determined in

the case and not what is said by the court or judge outside of the record or on points not necessarily involved therein. Such expressions do not become precedents.

(Cohens v. Virginia, 6 Wheat., 399; Ex Parte Christy, 3 How., 322, dissenting opinion of Catron, J.; Peck v. Jenness, 7 How., 612; Carroll v. Carroll, 16 How., 287.)

In the case of Cohen v. Virginia (supra) Chief Justice Marshall said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected but do not control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided but their possible bearing on all the other cases is seldom completely investigated."

But this limitation of the maxim ~~maxim~~ must itself be taken with a limitation. Thus, although a point may not have been fully argued, yet the decision of the court upon <sup>it constitutes a precedent.</sup> ~~it cannot be taken with a limitation.~~ Thus, although that be the case the decision of the

court cannot be considered obliter dicta when the question was directly involved in the issues of law raised by demurrer and the mind of the court was directly drawn to and distinctly expressed upon the subject. (Michael v. Moreg, 26 Md., 239.)

So, where a question regarded by the court as of general importance is solemnly decided after full argument and consideration and with a purpose to settle the law, it has been held as not inconsistent with the doctrine of obliter dicta that such a decision should become a binding precedent, although the question was not one necessary to be determined by the court. This was laid down in the remarkably able opinion of the Court of Appeals of Maryland (in Alexander v. Worthington, 5 Md., 488, 489): "All that is necessary to render a decision authoritative on any point decided is to show that there was an application of the judicial mind to the precise question adjudged." (See also Buchner v. R.R.Co., 60 Wis., 264; Wells on Res Adjudicata &c., Sec. 582.)

This seems to be a dangerous limitation of the doctrine and tends directly to remove one of the chief supports and benefits of the doctrine of Stare Decisis; for if a court may consider a question not necessarily involved in the case and render a decision thereon which

shall rise to the rank of a precedent it is easy to see how soon our courts might be occupied in considering purely academical topics and erecting into precedents their views of what the law ought to be rather than what it is. Whatever authority there may be for it, such a limitation is opposed to the true idea and doctrine of Stare Decisis. However well considered or wise or a logical conclusion however irresistible or a conclusion or analogy, it must be the very point, as Chief Justice Marshall calls it, arising in the case. Webster defines "decision" as "the act of settling or terminating a controversy by giving the victory to one side." If a question is not in controversy, no decision in the proper sense of the word can be rendered on it. Again, "a decision is the act of settling or terminating a controversy, but a process of reasoning, a syllogism or logical induction or deduction is in no proper sense a decision of a controversy." For this reason a court often follows a decision as a precedent while expressly rejecting the reason by which it was originally supported.

## CHAPTER III.

THE RULE AS BETWEEN DIFFERENT COURTS  
OF THE SAME STATE.

## (1) AS BETWEEN SUBORDINATE AND APPELLATE COURTS.

The rule is well laid down in the case of *Attorney-General v. Lunn* (2 Wis., 507); the court there said: "The decisions of the highest appellate court upon points in judgment presented and passed upon in cases brought before it are the law of the land until overruled and inferior courts are bound to obey them." (See also *Gibson v. Chouteau*, 7 Mo.App., 1.)

On the other hand the rule is equally well settled that the opinion of a nisi prius court, though perhaps admissible as persuasive evidence of the principle contended for is of course not binding as a precedent upon the appellate court, except in one instance, viz, that the Supreme court will adopt the construction placed by the inferior court upon its own rules of practice, (*Mix v. Chandler*, 44 Ill., 174).

The decisions of the chief appellate court of a territory before its erection into a state, or of the supreme court of a state prior to the adoption of a new constitution, will be recognized and followed by its successor under the new constitution unless manifestly

erroneous: (Doolittle v. Shelton, 1 Greene (Iowa), 272; Emery v. Reed, 65 Cal., 351.)

(2) AS BETWEEN COURTS OF CO-ORDINATE JURISDICTION.

It has been held by the supreme court of New York that as between nisi prius courts of the same state, the rule of Stare Decisis is in some instances applicable. (Andrews v. Wallace, 29 Barb., 350; Bentley v. Goodwin, 38 Barb., 633.) In the former New York case the language of the court is as follows: "Two or more decisions concurring on the same point made by co-ordinate branches of the same court in different districts should be recognized as precedents in the other districts until reversed by a higher authority." The same rule has been acknowledged in federal court decisions. (The Chelmsford, 34 Fed. Rep., 399; Reed v. Ry.Co., 21 Fed.Rep., 283.) In the case of the Chelmsford (supra) the District Court for the Central District of Pa., announced that it followed a prior decision of another district on the same point, although it considered such decision not founded upon sound principles. So in Reed v. Ry.Co.(C.C.N.Y.) (supra), in an action to establish an implied maritime lien against a vessel for supplies furnished at the home port at the owner's request and shipped to the vessel elsewhere, the court said: "In nei-

ther case (referring to two prior decisions upon the point by the Circuit Courts of other districts) is the subject discussed at any length or any adequate reason assigned, in my judgment, for the conclusion reached. So great, however, is the importance I attach to uniformity of decisions by courts of co-ordinate jurisdiction that I feel constrained to adopt the rule thus established." (See also *Worswick M'f'g Co. v. City of Phil.*, 30 Fed., U.S.D.C.Pa., 625; *Norton v. Taxing Dist. &c.*, 36 Fed., 99.)

But in a late Circuit Court decision (*Northern Pacific R.R.Co. v. Sanders*, Mont., 47 Fed., 604) it is said: "Finally, plaintiff urges that when one Circuit court decides a point all the others should conform their views to this decision until the matter is settled by the rulings of the Supreme Court. But this is not the rule which prevails in the Circuit Courts of the United States. A United States Circuit Court, undoubtedly always with reluctance will use its right to disagree with the decision of another Circuit court even when satisfied that it is erroneous;" The Court then proceeded to give a construction to the grant of Congress in aid of the Northern Pacific Railroad Company, directly the opposite of a prior decision of the same subject by another Circuit court, and concludes thus: "In the Bible

there is a command, 'Thou shalt not follow the multitude to do evil'"which to the mind of the court appeared conclusive of the matter.

The rule is qualified and further explained in the case of *Greenbaum v. Stein* (2 Daly, 223), as follows: "When there is a conflict of decisions on a given point among the tribunals of equal rank in a state the court in which the point is decided upon mature deliberation should adhere to its decision until over-ruled by a court of last resort."

From the brief quotations from circuit and district court decisions (above) we can see the attitude of the different circuits and districts as to the Doctrine of Stare Decisis. But the question before these courts is only whether or not the decision of another district will be considered as binding until an adverse decision of the Supreme Court is rendered and consequently the evils of a refusal to adhere to the principle will not be great, because in important cases involving any considerable amount an appeal may be had from these courts to the Circuit Court of Appeals and the U.S. Supreme Court. The people can engage in enterprises with reference to the settled rulings of the latter courts. By the Act of Congress, the Circuit Court of



Appeals of the United States was established (1891). Final appellate jurisdiction is given to that court in many cases subject to a review in certain exceptional cases by the Supreme Court. I have carefully examined the two volumes of reported cases already issued from the Cir.Ct. of Appeals and have failed to find any decisions directly in conflict. If, however, any of these courts refuse to follow prior decisions of other circuits the enormous evils and injuries resulting which were prophesized by English critics at the time of the passage of the act will undoubtedly be felt.

In New York, Virginia and other states during different periods of longer or shorter duration temporary tribunals have been organized for the purpose of giving aid to the court of last resort in the state when its docket has become crowded. One of these special courts in Virginia having on its reversal of a decree remanded the case for further proceedings in the court below, which lower court in the sequel pursued the mandate sent it, the Supreme Court of that state on a second appeal held that it could not entertain a complaint of error either in or behind the decree of the special court. (Bolling v. Lersen, 26 Gratton, 36; Norvell v. Camm, 2 Rand., 68, 85; Corvell v. Zeluff, 12 Gratton, 226, 234.)

In similar cases in New York, after a decision by the Commissioners of Appeals and a second appeal which came before the Court of Appeals itself, the latter court declined to inquire whether the former court had decided rightly. (Terry v. Wait, 56 N.Y., 91; Belton v. Baxter, 58 N.Y., 411.) And the same is true as to the recent Second Division of the Court of Appeals, (Manning v. Beck, 129 N.Y., 7, (dictum).).

But in New York when the question has arisen whether a decision of the Commissioners of Appeals or a decision of the Court of Appeals conflicting with it in different cases should be followed by a subordinate court, the decision of the Court of Appeals has been held entitled to preference as of higher authority, without an attempt at estimating the comparative weight of the several decisions themselves respectively considered on their own intrinsic merits. (Conner v. Weber, 12 Hun, 580, 584.)

## CHAPTER IV.

THE RULE AS BETWEEN FEDERAL  
AND STATE COURTS.

The decisions of the Supreme Court of the United States upon the construction of the Federal Constitution or the laws of the Union are conclusive and binding upon all the state tribunals; both because the interpretation of the organic law and the statutes of the nation properly belongs to its own judiciary, and because that court exercises a certain appellate jurisdiction in these matters over the courts of last resort in the several states. (*Black v. Lusk*, 69 Ill., 70; *Lebanon Bank v. Langan*, 28 Pa.St., 452.)

The converse of this rule is equally true: The federal courts will uniformly adopt the decisions of the state tribunals in the construction of their statutes and constitutions; and the interpretation given to a law of a state by its highest judicial tribunal is regarded in the federal courts as a part of the statute and is as binding upon them as the text. (*Jefferingwell v. Warren*, 2 Black (U.S.), 599; *Smith v. Kernochen*, 7 How., 198; *Christy v. Pridgeon*, 4 Wall., 196; *Nichol v. Levy*, 5 id., 433; *Williamson v. Snyder*, 6 id., 726; *Randall v. Brigham*, 7 id., 523; *Morgan v. Town Clerk* id., 610; *Boyle v. Arledge*, 1 Herupst., 620; *HamBorn v. Coma*, 97 U.S., 181;

Davis v. Briggs, id., 628; Ry. Co. v. Gaines, id., 697; Louisville etc. Ry. v. Miss., 133 U.S., 587; Peters v. Bain, id., 670.) Thus on the question of whether a state tax law conforms to the state constitution, the federal courts are bound by decisions of the state courts of last resort. (Dundee Mortg. Co. v. Parrish, 24 Fed., 197.)

But there is one exception to this rule, viz,- When the constitutional enactment or statute is alleged to be in violation of the federal constitution or laws of the United States, the Supreme Court will be at liberty to put its own construction upon it; for example, when the act in question is objected to as contravening the constitutional prohibition of legislation impairing the obligation of contracts the court will ascertain for itself independently of the state decisions whether a contract in fact exists and whether the statute has the effect attributed to it. (Jeff. Branch Bank v. Skelly, 1 Black (U.S.), 436; Louisville &c. R.R. v. Palmer, 109 U.S., 244; Pennoyer v. Neff, 95 U.S., 714; Cass Co. v. St. Louis, 95 U.S., 485; Gormley v. Clark, 134 U.S., 338; Johnson v. Risk, 137 U.S., 306.) But it seems the decision of the United States Supreme Court sustaining a state statute is not binding on a state court when the same question arises

under a similar statute. (People v. Eudd, 117 N.Y.,1.) And on the question of inter-state extradition, it is said the decisions of the state courts do not conclude federal courts. (Ex Parte Roberts, 24 Fed.,132.)

Where the rulings of the state court upon the construction of its constitution or laws have been subject to changes of opinion the federal courts will in general follow the latest settled adjudications. But where a question was once definitely settled by a series of decisions in the state court, such decisions being sustained by reason and authority, and one or two later cases over-rule them against all law and reason the Supreme Court will not feel bound to follow every oscillation of opinion. (Gelpcke v. Dubuque, 1 Wall., 175; Marshall v. Elgin, 3 McCarn, C.Ct.,35, to same effect.)

And where the U.S. Circuit Court in a particular case adopts the construction of a statute by the highest courts of the state and afterwards the state courts over-rule the former decisions and interpret the statute differently, this will not authorize a reversal of the judgment of the Circuit court. (Morgan v. Curtenius, 20 How.,1; Pease v. Peck, 18 How., 595; Burgess v. Seligman, 107 U.S., 20; Keokuk v. Ry.Co., 41 Fed., 305.) So where the Supreme Court has maturely adopted the construction

placed by the State court on the statutes of the state and the latter court afterwards gives a different interpretation on the same act, it is deemed more respectable to the U.S. Supreme Court for the Circuit and District courts to adhere to its decisions rather than to adopt the latest ruling of the State court until the question shall be again reviewed. (Neal v. Green, 1 McLean, 18.) But exactly the opposite course was taken in Moore v. Meyer, (47 Fed. Rep., Cir. Ct., 99.).

In questions of general commercial law the state adjudications, though entitled to great respect, do not furnish a binding rule of decision for the federal courts; and conversely the state courts in such matters are not concluded by the rulings of the national courts. (Supervisors v. Schenck, 5 Wall., 772; Hough v. Ry. Co., 100 U.S., 213; Burgess v. Seligman, 107 U.S., 20; Towle v. Forney, 14 N.Y., 423; Pickle v. The Bank 88 Tenn., 380.) Thus, although the rule that the law of the place where a contract is made will ordinarily govern its interpretation and applies to endorsements of negotiable paper, yet when that law is the common law or law merchant the question as to what such law is will not be concluded by the decisions of the highest courts of the state where the endorsement is made, suit being brought in a differ-

ent jurisdiction. (Franklin v. Twogood, 25 Iowa, 520.) And in such a question as this, the federal courts are not bound by the adjudications of the state within whose borders they sit. (National Bank v. Lock-stich Fence Co., 20 Reporter, 235.)

So a decision of a state court involving only the general principles of equity jurisprudence is not binding as authority on the federal courts. )Neves v. Scott, 13 How., 269; Russell v. Southard, 12 How., 139.)

## CHAPTER V.

THE RULE AS BETWEEN  
COURTS OF DIFFERENT STATES.

Rulings made under a similar system of jurisprudence prevailing in another state may be cited and respected for their reasons but are not necessarily to be accepted as guides, except in so far as those reasons commend themselves to judicial mind. (Caldwell v. Gale, 11 Mich., 77; Boyce v. St. Louis, 29 Barb., 650.) The decisions of another state, however, is accepted as authoritative guides in cases where a construction of the statutory law of such state became necessary. (Lane v. Watson, 51 N.J.Law, 186; Howe v. Welch, 14 Daly, 80; Crooker v. Pearson, (Kan.), 21 Pac., 270.)

But the opinion has been expressed that they  
but  
would be persuasive, not conclusive as to such construction, where the statutes in question but not the decisions are put in evidence. (Helson v. Gorce, 34 Ala., 565.)



## CHAPTER VI.

## VALUE OF THE ENGLISH DECISIONS.

"Great Britain and the thirteen original states had each substantially the same system of common law originally, and a decision now by one of the highest courts of Great Britain as to what the common law is upon any point is certainly entitled to great respect in any of the states, though not necessarily to be accepted as binding authority, any more than the decisions of any one of the other states, upon the same point. It gives us the opinions of able judges as to what the law is but its force as an authoritative declaration must be confined to the country for which the court sits and judges. But an English decision before the revolution is in the direct line of authority." (Cooley's Const. Lim., (star page) 52; see also *Chapman v. Gray*, 8 Ga., 341; *Koontz v. Nabb*, 16 Md., 549.)

## CHAPTER VII.

STATUTES OF ONE STATE RE-ENACTED  
IN ANOTHER.

Where a particular statute or clause of the constitution has been adopted in one state from the statutes or constitution of another after a judicial construction has been put upon it in the last mentioned state, it is but just to regard the construction as having been adopted along with the words, and all the mischiefs of disregarding precedents would follow as legitimately here as in any other case. (*Comm. v. Hartnett*, 3 Gray, 450; *Bennis v. Becker*, 1 Kans., 226; *Cooley's Const. Lim.*, 52.) But it does not follow necessarily that the prior decision construing the law must be inflexibly followed, since the circumstances in the state adopting it may be so different as to require a different construction. (*Little v. Smith*, 4 Scam., 402; *Gray v. Askew*, 3 Ohio, 479; *Cooley's Const. Lim.*, 52 n.) And the same is in general true of English statutes re-enacted in this country. Thus, Mr. Justice Story observes: "It is doubtless true as has been suggested at the bar that where English statutes -- such for example as the Statute of Frauds and the Statute of Limitations -- have been adopted into our own legislation the known and settled construction of these statutes by courts of

law had been considered as silently incorporated into the acts or has been received with all the weight of authority." (Pennock v. Dialogue, 2 Peters, 18.)

## CHAPTER VIII.

## PROPERTY RIGHTS NOT TO BE DISTURBED BY REVERSAL OF DECISIONS.

There are some questions in law, the final settlement of which is vastly more important than how they are settled; and among these are rules of property long recognized and acted upon and under which rights have vested. Accordingly when a principle of law, doubtful in its character and uncertain in the subject matter of its obligation has been settled by a series of judicial decisions the court will hesitate long before attempting to overthrow the result, notwithstanding they may think the previous authorities to be entirely erroneous. (*Pratt v. Brown*, 3 Wis., 609; *Rockhill v. Nelson*, 24 Ind., 422; *Harrow v. Myers*, 29 Id., 469; *Field v. Goldsby*, 28 Ala., 218; *Hahn v. Curtis*, 31 Cal., 398; *Emerson v. Atwater*, 7 Mich., 12; *Paulson v. City of Portland*, 19 Pac., (Or.), 450; *In re Haskins* ('91) 1 Ch., 358; *Frank v. Evansville R.R.Co.* (Ind), 12 N.E., 105; *Scott v. Stewart* (Ga.), 11 S.E., 897; *Ross v. Ross* (Or.), 26 Pac., 1008.)

In such cases it is better to leave the correction of the error to the legislature which can control its action so as to make it prospective only and thus

prevent unjust consequences. But these authorities must not be understood as holding that a previous line of decisions affecting property rights can in any case be over-ruled. That would be pushing the doctrine altogether too far. Hence if it should appear that the evils resulting from the principles established must be productive of greater mischief to the community than can possibly ensue from disregarding the previous adjudications on the subject the new rule should be created.

(Boon v. Powers, 30 Miss., 246; Goodell v. Jackson, 20 Johns., 722; Oakley v. Aspinwall, 13 N.Y., 500; Purniss v. Ferguson, 34 Id., 425; Joslin v. Cowee, 56 Id., 626.)

## CHAPTER IX.

## THE LAW OF THE CASE.

When a case has been decided in an appellate court and afterwards comes there again by appeal or writ of error only such questions will be noticed as were not determined in the previous decision; the points of law already adjudicated become the law of the case and will not be reversed or departed from (or rather are not to be) in any of its subsequent stages. (Chase v. Chase, 95 N.Y., 373; ~~see~~ Joslin v. Cowee, 56 id., 626; Furniss v. Ferguson, 34 id., 485; Joslin v. Cowee, 56 id., 626; Oakley v. Aspinwall, 13 N.Y., 500; ~~Overall~~ Overall v. Ellis, 38 Mo., 205; Phelan v. San Francisco, 20 Cal., 45; Davidson v. Dallas, 15 id., 82.) Nevertheless if the facts change on a second trial of the whole cause in the court below after remanding, these may so change the whole nature of the case as to require a new decision as applicable thereto; and if so, the former decision ceases to be the law of the case. For it is clear that a party on a re-trial de novo may introduce new evidence and establish an entirely different state of facts to conform to which is no violation of principles in a court even if thereby it does set aside its former decision as inapplicable and adopt a new one as suited to the new phase of the controversy. (Wells on Res Adj., sec., 619; 40 Cal., 671; 53 Ind. 355.)

## CHAPTER X.

## AFFIRMANCE BY EQUALLY DIVIDED COURT.

Where the deliberations of the appellate court result in an affirmance of the judgment of the trial court in consequence of an equal division of opinion among the judges no binding precedent is thereby established. The judgment in such a case, although it is as conclusive upon the rights of the parties to the litigation as any other would be (*Durant v. Essex Co.*, 7 Wall., 107) is not considered as settling the questions of law as to cases which may arise between other parties. (*Morse v. Gould*, 11 N.Y., 285; *Fridge v. Johnson*, 5 Wend., 242; *Etting v. Bank of U.S.*, 12 Wheat., 59, 78.)

## CHAPTER XI.

## C O N C L U S I O N.

The doctrine of Stare Decisis may be said to be a much abused one. Essayists in other fields have satirized it as a barren and illogical dogma; philosophers, so called, have characterized it as a "crude relic of primitive unreason;" idealists of all kinds have marked it as the stumbling block to the true development of the science of the law; even the courts have dealt it almost crushing blows (For example, see The Legal Tender Cases, 12 Wall., 457, reversing, 8 Wall., 603). Nevertheless, it has survived.

The great result of the doctrine and idea of Stare Decisis has been that it has linked the whole of our law together with bonds stronger than philosophy or pure science could have constructed. As has been attempted to be shown in the preceding pages of this essay, without the doctrine there could be no suitable or consistent administration of justice, no firm foundation even to vested rights, no security to property.



